STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH GREER, individually and as Conservator for MAKENZIE GREER, a Minor and ELIZABETH GREER,

Plaintiffs-Appellees/Cross-Appellants,

v

ADVANTAGE HEALTH and ANITA R. AVERY MD, jointly and severally,

Defendants-Appellants/Cross-Appellees

and

TRINITY HEALTH MICHIGAN, d/b/a ST. MARY'S HOSPITAL and KRISTINA MIXER, MD,

Defendants.

MSC Docket 149494

COA Docket 312655

Case No. 10-09033-NH
Kent County Circuit Court

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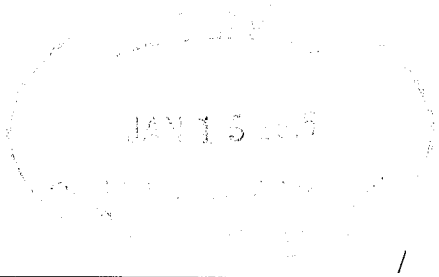

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BRIEF ON APPEAL OF APPELLANTS ADVANTAGE HEALTH AND ANITA R. AVERY MD

ORAL ARGUMENT REQUESTED

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INTRODUCTION AND SUMMARY OF ARGUMENT

I. INTRODUCTION & PROCEDURAL POSTURE

Plaintiffs-Appellees are Kenneth Greer (Mr. Greer), individually and as conservator for his minor daughter, Makenzie Greer (Makenzie), and Makenzie's mother, Elizabeth Greer (Mrs. Greer), collectively (the "Greers"). The Greers filed a one count complaint against four defendants on September 7, 2010. 2010 (App 1a–16a). The four defendants were Anita R. Avery, MD (Dr. Avery), her employer, Advantage Health, Trinity Health-Michigan d/b/a St. Mary's Hospital (St. Mary's), and Kristina Mixer, MD. The claim against Kristina Mixer, MD was dismissed on November 30, 2010 (Docket No. 189).[1] References to Docket Nos. in this brief relate to the corresponding docket numbers in the trial court's Register of Actions. References to the Appendix of Appellants-Cross-Appellees in this Brief relate to the relevant page numbers in the Appendix.

Prior to trial, the Greers settled their claims against St. Mary's for $600,000 (App 17a-19a). The case proceeded to trial against Advantage Health and Dr. Avery. The sole claim against Advantage Health was that it had vicarious liability for the acts of Dr. Avery. These defendants will hereafter be referred to collectively as Dr. Avery.

During trial, the Greers offered into evidence invoices for past medical expenses in the amount of $425,533.75. While counsel for Dr. Avery stipulated that the medical bills were in that amount, defense counsel expressly stated on the record that the Greers were entitled to recover only the amount of medical expenses paid for which there was a claimed lien, with a reduction in medical expenses to the amount actually paid after verdict and before judgment

[1] Since the claim against Kristina Mixer, MD was dismissed early on, this brief will discuss this case as if it was filed originally only against three defendants, Dr. Avery, Advantage Health and St. Mary's.

pursuant to MCL 600.6303. When the Greers offered the medical bills into evidence, defense counsel stated:

> What I am stipulating to is those are the amounts of the **medical bills**, but that – but I am reserving the right and my position is that the plaintiffs are entitled to recover only the medical expenses for which there is a claimed lien, nothing beyond that.
>
> THE COURT: Okay. I understand your position.
>
> MR. BERRY: Which can be subject to a post-trial motion.

(App 23a–24a) (emphasis added).

On April 27, 2012, the jury returned its verdict. The jury awarded no money to Mr. and Mrs. Greer but awarded Makenzie, among other things, past medical expenses in the full amount billed, $425,533.75. (App 72a-74a).

Prior to the entry of Judgment, on May 9, 2012, Dr. Avery moved the trial Court to reduce the award of past medical expenses to amounts paid as opposed to amounts billed, and for other relief including that the entire $600,000 settlement between the Greers and St. Mary's be setoff from any Judgment entered against Dr. Avery. (Docket No. 33). A hearing was held on this motion on June 7, 2012. (Docket No. 27). At the hearing, Dr. Avery presented the trial court with a booklet entitled "Summary of Argument Regarding Defendants' Motion for Reduction in Judgment." (Docket No. 3).

On August 8, 2012, the trial court entered its Opinion and Order regarding Dr. Avery's post-trial motions. (App 75a–81a). The trial court denied the request to reduce medical expenses to amounts paid as opposed to amounts billed, and granted Dr. Avery a setoff not in the amount of $600,000, but in the amount of $162,058.11.

On August 28, 2012, Dr. Avery filed a Motion for Reconsideration (Docket No. 15) which was denied by the trial court in an Opinion and Order issued on September 12, 2012 (App

82a–86a). On September 14, 2012, the trial court entered Judgment against Dr. Avery in the amount of $1,058,865.56. (App 87a–88a).

Dr. Avery filed her Claim of Appeal to the Michigan Court of Appeals on September 28, 2012, within the 21 day time period required by MCR 7.204. In her appeal Dr. Avery contended that, (1) The trial court erred in refusing to grant Dr. Avery a setoff in the entire amount of the $600,000 settlement between the Greers and St. Mary's, and (2) The trial court erred in refusing to reduce the award of medical expenses from $425,533.75 to the amount of medical expenses accepted by Makenzie's healthcare providers as full payment, $212,714.75. The balance of the medical expenses billed, $212,819.00, were not and never would be paid by the Greers or by their healthcare insurers, Aetna and Priority Health. (App 25a–71a)

Following oral argument, the Court of Appeals issued its written Opinion on May 13, 2014, *Greer v Advantage Health, et. al.,* 305 Mich App 192; 852 NW2d 198 (2014) (App 89a-100a). The Court of Appeals reversed the trial court and held that Dr. Avery should have been granted a setoff in the amount of $600,000, representing the entirety of the pre-trial settlement between the Greers and St. Mary's. However, the Court of Appeals affirmed the trial court's decision not to reduce the award of medical expenses. The Court of Appeals held that since Makenzie's healthcare insurers claimed a lien on the amount of medical expenses they paid ($212,714.75), the entire amount of medical expenses billed by Makenzie's healthcare providers ($425,533.75) were properly awarded as damages even though $212,819.00 of the amount billed (referred to by the Court of Appeals as the "insurance discount") was not paid by the Greers, their healthcare insurers, or anyone else, and even though the record established that this insurance discount would never be paid by anyone.

II. SUMMARY OF ARGUMENT

In this case, the Court of Appeals engaged in a thoughtful, though Dr. Avery believes erroneous, analysis of MCL 600.6303, which permits a post-verdict and pre-judgment reduction of medical expenses by collateral sources. The Court of Appeals recognized that Section 6303(4) defines "collateral source" to mean an insurance benefit "received or receivable." The Court of Appeals determined, correctly, that both medical expense payments by an insurance company (in this case $212,714.70), and the insurance discount (in this case $212,819.00) are insurance benefits "received or receivable."

The Court of Appeals next looked at the exception to the definition of collateral source contained in the last sentence of Section 6303(4). That sentence states that a collateral source does not include insurance benefits "paid or payable" by an insurance company if the insurance company claims a lien on those benefits "paid or payable." It is in construing the last sentence of Section 6303(4) where Dr. Avery submits the Court of Appeals made a mistake. Specifically, the Court of Appeals failed to appreciate the distinction between the phrases insurance benefits "received or receivable" which defines collateral sources, and insurance benefits "paid or payable" which defines the exception. The Court of Appeals concluded that the insurance benefits paid by Makenzie's health care insurers and the insurance discount were both insurance benefits "received or receivable" and insurance benefits "paid or payable." In doing so, the Court of Appeals improperly treated those two phrases as being synonymous.

Dr. Avery submits that the Court of Appeals was correct when it decided that both the medical expense payments and the insurance discount were benefits "received or receivable" and therefore a collateral source. Dr. Avery submits that the phrase insurance benefits "received or receivable" must have been intended by the legislature to mean something different than the

phrase insurance benefits "paid or payable" when the exception to the definition of collateral source was placed in the last sentence of Section 6303(4). In this case Makenzie's healthcare insurers claimed a lien on the medical expenses they "paid," and claimed no lien with respect to the insurance discount which is clearly an insurance benefit "received." Thus, the insurance discount is a collateral source which should reduce the award of medical expenses billed while the insurance benefits paid for which a lien is claimed should not. In summary, the award of medical expenses in this case, $425,533.75, should have been reduced by the insurance discount, $212,819.00, which represents an insurance benefit received as a collateral source.

Such a reading of Section 6303(4) not only recognizes the linguistic distinction employed by the legislature in using the phrases insurance benefits "received or receivable" versus "paid or payable," but also serves the clear legislative purpose behind Section 6303. As recognized by the Court of Appeals in this case, the legislative purpose behind Section 6303 is to preclude a plaintiff from receiving a double recovery for a single loss, and "treating insurance discounts as a collateral source under Section 6303 would be consistent with the legislature's purpose . . . ." The interpretation and application of Section 6303 involves legal principles of major significance to Michigan's jurisprudence. Various other Court of Appeals' decisions have employed various interpretive philosophies with regard to Section 6303, and the Court of Appeals in this case erroneously interpreted and applied Section 6303. Therefore, Dr. Avery respectfully requests that this Court reverse that part of the Court of Appeals' Opinion which denied Dr. Avery a reduction in the medical expense award against her.

STATEMENT OF QUESTION PRESENTED

I. **DID THE COURT OF APPEALS ERR IN ITS INTERPRETATION OF MCL 600.6303 BY FAILING TO REDUCE THE AWARD FOR PAST MEDICAL EXPENSES AGAINST DR. AVERY BY THE INSURANCE DISCOUNT TOTALING $212,819.00 WHICH THE COURT OF APPEALS CORRECTLY DETERMINED WAS AN INSURANCE BENEFIT "RECEIVED OR RECEIVABLE" AND, THEREFORE, A COLLATERAL SOURCE WITHIN THE MEANING OF SECTION 6303(4)?**

Defendants-Appellants answer, "Yes".

Plaintiffs-Appellees would answer, "No".

The trial court answered, "No."

The Court of Appeals answered, "No."

STATEMENT OF THE BASIS OF JURISDICTION

The Court of Appeals issued a published Opinion in this case on May 13, 2014 (App 89a-100a). The Application for Leave to Appeal to this Court was filed by Defendants-Appellants within 42 days of the Court of Appeals' Opinion, and this Court granted the Application for Leave to Appeal. Therefore, this Court has jurisdiction to consider this Appeal under MCR 7.302(C).

STATEMENT OF FACTS

Plaintiffs-Appellees are Kenneth Greer (Mr. Greer), individually and as conservator for his minor daughter, Makenzie Greer (Makenzie), and Makenzie's mother, Elizabeth Greer (Mrs. Greer), collectively (the "Greers"). The Greers filed a one count complaint against four defendants on September 7, 2010. 2010 (App 1a-16a). The four defendants were Anita R. Avery, MD (Dr. Avery), her employer, Advantage Health, Trinity Health-Michigan d/b/a St. Mary's Hospital (St. Mary's), and Kristina Mixer, MD. The claim against Kristina Mixer, MD was dismissed on November 30, 2010 (Docket No. 189).[2]

Prior to trial, the Greers settled their claims against St. Mary's for $600,000 (App 17a-19a). The case proceeded to trial against Advantage Health and Dr. Avery. The sole claim against Advantage Health was that it had vicarious liability for the acts of Dr. Avery. These defendants will hereafter be referred to collectively as Dr. Avery.

During trial, the Greers offered into evidence invoices for past medical expenses in the amount of $425,533.75. While counsel for Dr. Avery stipulated that the medical bills were in that amount, defense counsel expressly stated on the record that the Greers were entitled to recover only the amount of medical expenses paid for which there was a claimed lien, with a reduction in medical expenses to the amount actually paid after verdict and before judgment pursuant to MCL 600.6303. When the Greers offered the medical bills into evidence, defense counsel stated:

> What I am stipulating to is those are the amounts of the **medical bills**, but that – but I am reserving the right and my position is that the plaintiffs are entitled to recover only the medical expenses for which there is a claimed lien, nothing beyond that.

[2] Since the claim against Kristina Mixer, MD was dismissed early on, this brief will discuss this case as if it was filed originally only against three defendants, Dr. Avery, Advantage Health and St. Mary's.

THE COURT: Okay. I understand your position.

MR. BERRY: Which can be subject to a post-trial motion.

(App 23a-24a) (emphasis added).[3]

On April 27, 2012, the jury returned its verdict. The jury awarded no money to Mr. and Mrs. Greer but awarded Makenzie, among other things, past medical expenses in the full amount billed, $425,533.75. (App 72a-74a).

Prior to the entry of Judgment, on May 9, 2012, Dr. Avery moved the trial Court to reduce the award of past medical expenses to amounts paid as opposed to amounts billed, and for other relief including that the entire $600,000 settlement between the Greers and St. Mary's be setoff from any Judgment entered against Dr. Avery. (Docket No. 33). A hearing was held on this motion on June 7, 2012. (Docket No. 27). At the hearing, Dr. Avery presented the trial court with a booklet entitled "Summary of Argument Regarding Defendants' Motion for Reduction in Judgment." (Docket No. 3).

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On August 28, 2012, Dr. Avery filed a Motion for Reconsideration (Docket No. 15) which was denied by the trial court in an Opinion and Order issued on September 12, 2012 (App 82a-86a). On September 14, 2012, the trial court entered Judgment against Dr. Avery in the amount of $1,058,865.56. (App 87a-88a).

[3] The position stated by Dr. Avery's counsel, perhaps inartfully, was that the only relevant measure of damages for medical expenses was the amount actually paid as opposed to the amount billed for medical services. In that regard, Dr. Avery adopts the arguments set forth in the Amicus Brief of Michigan Professional Insurance Exchange.

Dr. Avery filed her Claim of Appeal to the Michigan Court of Appeals on September 28, 2012, within the 21 day time period required by MCR 7.204. In her appeal Dr. Avery contended that, (1) The trial court erred in refusing to grant Dr. Avery a setoff in the entire amount of the $600,000 settlement between the Greers and St. Mary's, and (2) The trial court erred in refusing to reduce the award of medical expenses from $425,533.75 to the amount of medical expenses accepted by Makenzie's healthcare providers as full payment, $212,714.75. The balance of the medical expenses billed, $212,819.00, were not and never would be paid by the Greers or by their healthcare insurers, Aetna and Priority Health. (App 25a-71a)

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STANDARD OF REVIEW

The interpretation and application of a Michigan statute, such as MCL 600.6303, by a trial court and the Court of Appeals is a legal issue reviewed *de novo*. *Shivers v Schmiege*, 285 Mich App 636; 776 NW2d 669 (2009); *Heinz v Chicago Road Investment Co.,* 216 Mich App 289, 295; 549 NW2d 47 (1995). Thus, questions of statutory construction and interpretation are reviewed *de novo*. *Kaiser v Allen,* 480 Mich 31, 35; 746 NW2d 92 (2008); *Ostroth v Warren Regency, GP, LLC,* 474 Mich 36, 40; 709 NW2d 589 (2006).

LAW & ARGUMENT

I. AN INSURANCE DISCOUNT IS A BENEFIT "RECEIVED OR RECEIVABLE" FROM AN INSURANCE POLICY THAT IS NOT SUBJECT TO A CONTRACTUAL LIEN AND, THUS, IS A COLLATERAL SOURCE WITHIN THE MEANING OF MCL 600.6303.

The Michigan collateral source set-off rule requires the trial court to reduce the jury's award of damages by collateral sources. MCL 600.6303(1). A collateral source is statutorily defined as a benefit "received or receivable" from an insurance policy. MCL 600.6303(4). Specifically excluded from that definition are benefits "paid or payable" by an entity that is entitled by contract to a properly exercised lien against the proceeds of a recovery by a plaintiff in a civil action for damages. *Id.* Here, the Greers claimed $425,533.75 in medical expenses, but their health care insurers paid $212,714.75 to fully satisfy those medical expenses pursuant to a negotiated discount they secured with the Greers' health care providers. The negotiated discounts are benefits from an insurance policy that are not subject to an insurer's lien against the proceeds of a recovery; thus they must be reduced from the judgment as a collateral source under MCL 600.6303.

At common law, the collateral source rule prevented defendants from presenting evidence to the jury that a third party, such as a health insurer, paid all or part of the requested economic damages. The rationale for this rule was that a tortfeasor should not be allowed to benefit from the plaintiff's prudent decision to obtain insurance coverage. *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984). This rule was found to be unduly harsh in cases where all or most of the plaintiff's expenses were compensated by insurance, and thus, it could not really be said that a plaintiff had suffered economic loss. To remedy this injustice, the Legislature adopted the collateral source setoff statute, MCL 600.6303, as part of the tort reforms adopted by 1986 PA 178.

The 1986 legislation was adopted to implement a series of tort reforms proposed by the Report of the Senate Select Committee on Civil Justice Reform in September of 1985 (App 101a-106a). That Report recommended the collateral source rule be eliminated and replaced by a new statutory provision requiring the court to reduce any judgment by "an amount equal to collateral source payments, less premiums paid and the value of the employee fringe benefit package." The Report explained the basis for this recommendation as follows, emphasizing the Committee's rationale that plaintiffs should not be allowed a double recovery for economic losses, and the defendant's liability should be measured by the extent a plaintiff has suffered uncompensated pecuniary, out-of-pocket loss:

> The collateral source rule prohibits the introduction into evidence of the fact that a plaintiff has already been compensated or reimbursed for injuries from a source other than the defendant (private health insurance, workers compensation and the like). It seems improper for the plaintiff to be twice reimbursed by retaining collateral payments as well as receiving full payment for the same item from the defendant.
>
> The proposed modification of this rule is necessary to eliminate this 'double recovery' by the plaintiff. Since the underlying purpose of the tort system is to make the plaintiff whole, it is unfair for them to be twice compensated for the same item. The proper measure of the liability of the defendant should be the extent to which the plaintiff suffered uncompensated pecuniary, out-of-pocket losses.
>
> The elimination of this rule would have a significant impact on both the amount of medical malpractice awards and insurance premiums without denying the plaintiff any uncompensated losses. A study by the American Bar Association found that in a typical state which has broadly repealed the collateral source rule, it would appear that malpractice awards would be reduced by about 20 percent. A Rand Corporation study is consistent with this finding, stating that a ban on this double recovery reduces court awards by about 18 percent.

Id.

MCL 600.6303, adopted in response to the Committee's recommendation, now provides as follows:

> (1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.
>
> (2) The court shall determine the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source. Except for premiums on insurance which is required by law, that amount shall then be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source.
>
> (3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.
>
> (4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a healthcare corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil

> action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).
>
> (5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits.

MCL 600.6303.

In *Heinz v Chicago Road Inv Co,* 216 Mich App 289, 301; 549 NW2d 47 (1995), the Court of Appeals concluded that the legislature's intent in enacting MCL 600.6303 was to "promote fairness, i.e., *to prevent personal injury plaintiffs from being compensated twice for the same injury.*" (emphasis added).

The usual rules of statutory construction must be applied to determine the meaning and scope of these provisions. *Heinz, supra* at 295. It is well settled that clear and unambiguous statutory language will be applied as written, but construction is appropriate where the language in question is subject to differing interpretations. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Shinholster v Annapolis Hospital*, 471 Mich 540, 548-549; 685 NW2d 275 (2004); *People v Stanaway,* 446 Mich 643, 658; 521 NW2d 557 (1994); *Heinz v Chicago Road Investment Co., supra* at 295.

In discerning legislative intent, the Court must give effect to every word, phrase, and clause, and consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *Shinholster, supra* at 549. Undefined statutory terms must be given their plain and ordinary meaning, and it is appropriate to consider dictionary definitions to determine their meaning. *Johnson v Pastoriza*, 491 Mich 417, 436-37; 818 NW2d

279 (2012). However, statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998); *Franges v General Motors Corp*, 404 Mich 590, 612; 274 NW2d 392 (1979).

The statutory scheme embodied in MCL 600.6303 has not eliminated the common law rule preventing the defendant from presenting evidence of a collateral source ***at trial*** to reduce a jury's award. Under subsection 6303(1), evidence to establish that economic loss was satisfied by a collateral source may be presented to the court ***after a verdict***. If the court determines all or a part of the plaintiff's expense or loss has been satisfied by a collateral source it must then reduce the portion of the judgment which represents damages satisfied by the collateral source. Section 6303(2).[4]

Subsection 6303(4) defines what a "collateral source" is. The first sentence of subsection 6303(4) defines a collateral source as "benefits ***received or receivable*** from an insurance policy." (emphasis added). The second and third sentences of 6303(4) provide exceptions to the general definition of what constitutes a collateral source, but only with respect to insurance "benefits ***paid or payable***"; the exception does not include the broader category of "benefits ***received or receivable***." The exceptions in the second and third sentences of 6303(4) to what constitutes a collateral source are (1) ***benefits paid*** by an entity entitled to a lien by law and (2) ***benefits paid*** by an entity entitled to a lien by contract.

A "benefit" may be either "an advantage" or "a payment or series of payments." *Websters II New Riverside Dictionary* (1984, p. 66)

[4]Subsection 6303(2) requires that the amount of the reduction for a collateral source payment be reduced by the amount of premiums paid for insurance benefits. The Greers have never presented any evidence respecting the amount of premiums they paid for the insurance benefits they received.

In this case, the medical expenses awarded by the jury were $425,333.75. This represented the amount billed by the Greers' health care providers. However, the amount paid by the Greers' health care insurers was only $212,714.75. The balance was discounted pursuant to agreements between the health care providers and the health insurers. This discount ($212,819.00) was clearly an insurance "benefit received" by the Greers. It was an advantage the Greers received by virtue of the agreement between their health insurers and their health care providers. This "benefit received" is a collateral source. The actual payment of $212,714.75 was also a benefit received by the Greers. It is only this "benefit paid" by the health care insurers which is subject to a contractual lien and therefore not a collateral source.

Pursuant to 6303(1) and (2), the trial court should have reduced the award of past medical expenses as the Greers expenses were satisfied by a collateral source. The expenses were satisfied by the Greers healthcare insurers in two ways. There was an actual transfer of money in the amount of $212,714.75. The balance of the medical expenses was discounted pursuant to a negotiated discount between the Greers' health care providers and their health care insurers.[5] In short, the Greers' health care insurers satisfied the total amount of the medical expenses by transferring money in the amount of $212,714.75 and by settling the balance of the medical expenses billed through a negotiated discount (referred to by the Court of Appeals in this case as the "insurance discount") between the healthcare insurers and the healthcare providers. Both forms of benefits were "received" by the Greers. While a lien exists in favor of the healthcare insurers with respect to the money transferred, no lien exists with respect to the amount of the medical expenses discounted. With regard to the amount paid by the healthcare insurers for

[5]The word "paid" as used in 6303(1) & (2) is the past tense of the form of the verb "pay". *The Merriam Webster's Collegiate Dictionary* (11th edition 2003, p. 910) provides a number of definitions of "pay" many of which do not require or contemplate the transfer of money. Those definitions include, "to discharge indebtedness for: settle – a bill."

which they claim a contractual lien, $212,714.75, the jury's award of past medical expenses should stand. 6303(4). The discounted amount is also a benefit received by the Greers from a collateral source. The amount of medical expenses awarded to the Greers by the jury should be reduced by the amount of the discount ($212,819.00). Thus, the jury's award of past medical expenses should be reduced from $425,533.75 to the amount paid by the health care insurers, $212,714.75.

In this case, the trial court determined that no collateral source reduction could be made because the Greers' health insurers, Aetna and Priority Health, asserted their lien rights to the amount of insurance benefits they "paid". The trial court relied on *Zdrojewski v Murphy*, 254 Mich App 50; 659 NW2d 721 (2002) to support its decision. However, the circumstances in *Zdrojewski* were far different from the circumstances presented in this case.

In *Zdrojewski*, the issue presented was whether the total amount paid by plaintiffs' health care insurer, $88,000 was not a "collateral source", or whether the health care insurer's claimed lien in a lesser amount, $21,700, was not a collateral source. The Court of Appeals determined that the entire $88,000 of medical expenses actually paid by the health care insurer was not a collateral source, even though the lien amount was less than the amount of medical expenses actually paid. In this case, by contrast, the amount billed for health care services was $425,533.75, but the amount actually paid, and accepted as full payment by the health care providers, was $212,714.75. If the health insurers in this case claimed a lien of less than the full amount they paid, pursuant to *Zdrojewski*, the full amount paid would not be a collateral source. The Court of Appeals in this case recognized the trial court's error in relying on *Zdrojewski* to deny Dr. Avery's request to reduce the award of medical expenses.

In its opinion in this case the Court of Appeals recognized that Section 6303(4) defines "collateral source" to mean an insurance benefit "received or receivable." The Court of Appeals determined, correctly, that both the medical expense payments by an insurance company and the insurance discount are insurance benefits "received or receivable."

The Court of Appeals in this case next looked at the exception to the definition of collateral source contained in the last sentence of Section 6303(4). That sentence states that a collateral source does not include insurance benefits "paid or payable" by an insurance company if the insurance company claims a lien on those benefits "paid or payable." It is in construing the last section of Section 6303(4) where Dr. Avery submits the Court of Appeals made a mistake. Specifically, the Court of Appeals failed to appreciate the distinction between the phrases insurance benefits "received or receivable" which defines collateral sources, and insurance benefits "paid or payable" which defines the exception. The Court of Appeals concluded that insurance benefits paid by Makenzie's healthcare insurer and the insurance discount were both insurance benefits "received or receivable" and insurance benefits "paid or payable." In doing so, the Court of Appeals improperly treated those two phrases as being synonymous. Violative of the principles of statutory construction announced by this Court in *Shinholster, supra* at 549, the Court of Appeals failed to give every phrase effect and consider both the plain meaning of the phrase as well as its placement and purpose in the statutory scheme.

The interpretation of Section 6303 advocated by Dr. Avery here is consistent with the legislative intent underlying the adoption of MCL 600.6303. In interpreting the statute, the statutory language must be read as a whole. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). The reported decisions have noted, consistent with the concerns expressed by the Senate Select Committee's Report, that the legislature's purpose was to promote fairness by

preventing a double recovery for the same injury. *Heinz, supra* at 301; *Haberkorn v Chrysler Corp*, 210 Mich App 354, 375; 533 NW2d 354 (1995). Further, Section 6303 should be construed to avoid an absurd, unjust or unreasonable result. *McAuley, supra; Franges, supra; Rogers v City of Detroit*, 457 Mich 125, 157; 579 NW2d 840 (1998), overruled on other grounds, 462 Mich 439; 613 NW2d 307 (2000). The legislative purpose would be faithfully served and an absurd and unjust result would be avoided by reducing the award for past medical expenses to the amount paid by the Greers' health care insurers. The legislative purpose would not be served and an absurd and unjust result would flow from compensating the Greers for medical expenses that neither they nor anyone else have paid or ever will pay.

Similar approaches have been followed to prevent unjust results in other states with similar collateral source statutes. In *Swanson v Brewster,* 784 NW2d 264 (Minn 2010), the Minnesota Supreme Court found that the defendant was entitled to a collateral source reduction for negotiated discounts. In interpreting a similar collateral source statute enacted in Minnesota in 1986, the Minnesota Supreme Court found that negotiated discounts are classified as collateral source payments and thus should be deducted from an award of economic damages. *Swanson, supra* at 266.

Likewise, in *Dyet v McKinley,* 139 Idaho 526; 81 P3d 1236 (2003) and *Kastik v U-Haul Company of Western Michigan,* 740 NYS2d 167; 292 AD2d 797 (2002), the Idaho Supreme Court and the New York Supreme Court, Appellate Division, upheld reductions of medical expense awards for negotiated discounts even though these amounts did not technically qualify as collateral source payments. The courts found that because the discounted amounts were amounts for which the plaintiff incurred no liability, they were not an item of damages which the plaintiff could recover. The same rationale applies with equal force to this case.

In this case the amount of medical bills, $425,533.75 was submitted to the jury subject to the reservation of Dr. Avery that the Greers were only entitled to recoup medical expenses actually paid. This reservation was to be addressed in a post-trial motion under MCL 600.6303. The Greers' health care insurers paid $212,714.75 in full satisfaction of the medical expenses actually billed. The balance, $212,819.00, was discounted. The award of past medical expenses should be reduced to $212,714.75 pursuant to Section 6303.

The purpose of tort damages is to compensate the injured party and make him whole. Thus, a tort plaintiff can only recover for the reasonable and necessary damages actually sustained because of the defendant's acts or omissions. *Murray v Ferris*, 74 Mich App 91, 95; 253 NW2d 365 (1977). Where medical expenses are discounted through an agreement between the health insurer and the healthcare provider, the discounted portion of the medical expenses will never be paid by the plaintiff, the insurer, or anyone else. Those discounted medical expenses are not damages which can be recovered in a tort action. See, *Bombalski v Auto Club Ins Ass'n*, 247 Mich App 536, 543; 637 NW2d 251 (2001). Moreover the discounted portion of the medical expenses is an insurance benefit "received or receivable", but not one to which any lien can attach. Thus, the insurance discount is a collateral source which should reduce the award of medical expenses pursuant to § 6303.

CONCLUSION & RELIEF REQUESTED

Dr. Avery requests that this reverse that portion of the Opinion of the Court of Appeals which declined to reduce the award of past medical expenses by the amount of the insurance discount.

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